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From:

Sent: Friday, January 14, 2011 4:21:05 PM

To:

Cc:

Subject: RE: Form 872 Advice

You asked for our assistance in answering two questions involving the following facts. Taxpayers, Husband and Wife timely filed a joint Federal Tax Return, Form 1040. Husband died on . Because is a community property state with right of survivorship, no estate was created on the date of Husband's death. Rather, all property passed to Wife outside of probate. Wife filed an amended return (Form 1040X) by signing her name and typing on the line where the spouse would normally sign his name - "Filing as Surviving Spouse."

We doubt whether the Service should accept the amended return as filed by Wife. In general, a surviving spouse may file a joint return on behalf of herself and the decedent only when no administrator or executor has been appointed (and none is appointed before the last day prescribed by law for filing the return of the surviving spouse), but only if no return for the taxable year has been made by the decedent. I.R.C. § 6013(a)(3). Based on the facts you provided, Husband already made a return—the joint return with Wife. Absent any authority to act on behalf of Husband, Wife may not file an amended joint return.

Regardless, the Service now wants to solicit Form 872 to extend the assessment statute.

Issue 1: what name(s) should be on the Name line of page 1 of the Form 872?

Answer 1: The names of both Husband and Wife should appear on the Name line of page 1 on Form 872 since the couple filed a joint return for the year at issue.

Issue 2: how should the surviving spouse sign page 2 of the Form 872?

Answer 2: The surviving spouse should sign her name only on Form 872. Without authority to act on behalf of Husband (or Husband's estate), however, Wife may not sign Form 872 to extend the assessment statute against Husband. See *Estate of Weisel v. Commissioner*, T.C. Memo. 1990-351; see also Rev. Rul. 83-41. Based on the facts you provided, Husband did not give Wife this authority in a will or other

declaration (e.g., Form 2848, Power of Attorney). We are also not aware of any local law that would give Wife this authority.

Please contact me if you have any other questions.

Thanks,